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Don Hultman
U.S. Fish and Wildlife Service
Upper Mississippi River National Wildlife and Fish Refuge
51 E. Fourth Street - Room 101
Winona, MN 55987

Re: Comments on the Upper Mississippi River National Fish & Wildlife Refuge's Draft Environmental Impact Statement and Comprehensive Conservation Plan.

Dear Mr. Hultman:

The National Marine Manufacturers Association ("NMMA") and the Personal Watercraft Industry Association ("PWIA") offer these comments in response to the Upper Mississippi River National Wildlife & Fish Refuge's Draft Environmental Impact Statement and Comprehensive Conservation Plan ("DEIS/DCCP"). NMMA and its members support preserving the resources in the Upper Mississippi River National Wildlife & Fish Refuge ("UMR Refuge" or "Refuge") for use by future generations of recreational boaters. NMMA understands the need to preserve this important river resource and that vibrant natural ecosystems greatly enhance enjoyment of the Refuge. Our members, however, want to ensure that the U.S. Fish and Wildlife Service give recreational boating and fishing activities due consideration and does not unduly restrict such activities. In particular, the PWIA and PWC Companies are vitally interested in ensuring that PWC use continues, on fair and non-discriminatory terms, in areas in the Refuge that permit motorized recreational boating.

By way of background, NMMA is the nation's largest recreational marine industry association, representing more than 1,500 boat builders, engine manufacturers, and marine accessory manufacturers. NMMA members collectively produce more than 80 percent of all recreational marine products made in the United States, including boats, engines, and marine accessories and components. With 13 million registered boats and 69 million boaters nationwide, the recreational boating industry contributes $33 billion and 500,000 jobs annually to our nation's economy.

PWIA is an affiliate of NMMA and is made up of the following member companies: American Honda Motor Co., Inc., Bombardier Recreational Products, Inc., Kawasaki Motors Corp., U.S.A. and Yamaha Motor Corporation, U.S.A. (collectively, "PWC Companies"). The PWC Companies manufacture and/or distribute personal watercraft ("PWC").

I. SUMMARY OF COMMENTS

In the DEIS/DCCP, the U.S. Fish & Wildlife Service ("Fish & Wildlife") proposes and evaluates four comprehensive, long-term plans for managing resources and activities within the Refuge. Each plan contains provisions that address motorized boating[1]:

- Alternative A, the no-action alternative, continues current management policies, including a single electric motor area, which encompasses 222 acres that are open only to non-motorized boats. This approach accommodates the broadest mix of compatible uses without unduly restricting access or recreational choices.

- Alternative B, the wildlife focus alternative, includes ten electric motor areas that render nearly 16,000 acres of the unit off limits to motorized boats.

- Alternative C, the public use alternative, creates fifteen electric motor areas, encompassing over 13,000 acres within which motorized boating is prohibited.

- Alternative D, the wildlife and integrated public use focus, imposes sixteen electric motor areas that encompass nearly 15,000 acres, which represents approximately 6% of the UMR Refuge's total area and 10% of the total water surface area. Alternative D also creates new no-wake zones and imposes an "open-unless-closed" policy, which could further restrict boater and visitor access to beaches and camping areas.

Alternative D is the UMR Refuge's preferred alternative despite the absence of objective or even anecdotal evidence justifying its sweeping restrictions. These restrictions effectively limit motorized boating to the main river channel in many areas and preclude backwater and beach access, which are popular fishing and wildlife observation areas for motorized boaters generally and PWC users in particular. The most current data and environmental impact analyses demonstrate that cumulative boating and PWC activity will not impair the Refuge's natural resources, wildlife or habitats. Thus, the record does not and cannot support Alternative D's boating management proposals. Moreover, although Alternative D is facially neutral, its restrictions disproportionately impact PWC and other motorized vessels capable of operating in backwater areas. DEIS/DCCP at xxvi-xxviii, 101-32. These restrictions conflict with the UMR Refuge's professed management goals as well as with Illinois law, which precludes disparate regulation of PWC or other vessels. Finally, by not publishing the DEIS/DCCP in the *Federal Register*, U.S. Fish & Wildlife has ignored the Administrative Procedure Act ("APA").

Accordingly, the NMMA and PWIA oppose Alternative D and support Alternative A, which has over time proven to be a fair and environmentally sound approach to managing

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[1] We use the term motorized boating to refer to non-electric motorized boats.

motorized boating activity with the UMR Refuge.[2] NMMA and PWIA also oppose Alternatives B and C as unduly restrictive of motorized boating.

II. BACKGROUND

A. Establishment and Purpose Of The Refuge System and the UMR Refuge

Congress established the National Wildlife Refuge System ("Refuge System") in 1966. Fish & Wildlife administers the Refuge System for the purpose of conserving, managing and restoring wildlife, fish, plant and habitat resources. 16 U.S.C. § 668dd(a)(2). While conservation is the Refuge System's principal purpose, Congress has also directed Fish & Wildlife to permit "compatible wildlife-dependent recreational uses." *Id.* § 668dd(a)(3)(C). A "compatible use" is any use that will not "materially interfere with or detract from the fulfillment of the mission of [the Refuge System]." *Id.* § 668ee(1). A "wildlife-dependent recreational use" refers to activities such as hunting, fishing and wildlife observation. *Id.* § 668ee(2). The Refuge System's enabling legislation states that compatible wildlife-dependent recreational uses are "priority uses" that should be facilitated. *Id.* § 668dd(a)(3)(C)-(D).

Fish & Wildlife manages each unit of the Refuge System in accordance with these general legislative mandates and the unit's specific enabling legislation. Congress created the UMR Refuge in 1924. The unit's enabling act directs Fish & Wildlife to manage the Refuge as a sanctuary and breeding place for migratory and other birds, animals and fish. *Id.* § 723. Although the act does not specifically mention recreation, Fish & Wildlife has determined that motorized boating, including PWC use, is a compatible use within the UMR Refuge. DEIS/DCCP App. E (p. 343).

While it is the primary agency responsible for administering the Refuge, Fish & Wildlife does not have unilateral authority. Indeed, Fish & Wildlife shares authority with several state governments and other federal agencies, including the U.S. Army Corps of Engineers, DEIS/DCCP § 1.4.3 (pp. 10-14), and the U.S. Coast Guard, *id.* § 2.4.1 (p. 34). For this reason, Fish & Wildlife determined that "[b]anning any type of watercraft was not deemed a reasonable alternative due to the mix of jurisdictions and authorities within the Refuge." *Id.* § 2.3 (p. 32).

B. Development And Scope Of Motorized Boating In the UMR Refuge

The UMR Refuge encompasses a 261 mile stretch of the Mississippi River extending from Wabasha, Minnesota to Rock Island, Illinois. The Refuge comprises approximately 240,000 acres of Mississippi River floodplain and is divided into four districts for management purposes.

Minnesota, Wisconsin, Iowa, and Illinois (the "States") consented to the grant of all of the lands and waters that constitute the UMR Refuge. The Refuge coordinates many of its

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[2] The NMMA and PWIA take no position regarding the non-boating aspects of the DEIS/DCCP.

decisions and activities with the surrounding states, "[d]ue to often overlapping and shared responsibilities and authorities for fish and wildlife resources between the states and the Refuge." *Id.* § 1.4.3.2 (p. 13). As a result, the Refuge often adopts or defers to state practices "for the use and enjoyment of fish and wildlife resources." *Id.* Additionally, the UMR Refuge law enforcement and engineering efforts are coordinated with the States. *Id.* To facilitate this cooperation, the States and Refuge created the Upper Mississippi River Basin Association and Upper Mississippi Conservation Committee.

The Upper Mississippi has long been a popular recreation area. Fish & Wildlife estimates that each year 1.8 million visitors use the Refuge "for recreational boating, camping, picnicking, swimming, social gatherings, and other beach-related uses." *Id.* § 3.3.6 (p. 235). Studies indicate that the highest level of motorized boating occurs near beach areas throughout the Refuge. *Id.* (p. 236). A 2003 study conducted by the Minnesota Department of Natural Resources estimates that 60% of all boating use occurs in the main navigation channel, while 40% occurs in side channels and backwater areas. *Id.* These backwaters provide unique recreational and wildlife-observation opportunities for many visitors, particularly boaters. The Minnesota Department of Natural Resources also purports to describe the "average" boating trip in the UMR Refuge: the average boating party size is 2.9 people, most of whom are adults; few trips were overnight; most boaters do not leave the area into which they launch; fishing is the primary activity of half of the boaters; and anglers spend most of their time in side channels and backwaters. *Id.*

The UMR Refuge has designated four canoe channels and one electric motor area for recreational boaters engaged in "silent sport" activities, such as kayaking and canoeing. To increase visitor safety, there are 45 no-wake zones in high traffic and blind-spot areas. These constraints apply to all boats currently operating in the Refuge. The proposed management alternatives build upon these rules:

- Under Alternative A, the no-action alternative, current boating rules continue to apply, including the four canoe channels and one electric motor area mentioned above, as well as the 45 no-wake zones. *Id.* § 4.5.8 (p. 277). This approach maximizes recreational choice and extends the current boating management scheme, which has proven to be an effective and environmentally sound strategy for balancing the Refuge's competing commitments to conservation and recreation.

- Under Alternative B, the wildlife focus option, it is estimated that recreational boating, camping and other beach-related uses will decline by 15 percent due to the imposition of a "closed-unless-open" policy on Refuge shoreline and beach areas. This policy allows managers to decide when and how often a particular beach area is open. In addition, recreation is prohibited in waterfowl hunting closed areas even though many of these areas fall in long-standing boating routes. Even more troubling is the fact that Alternative B creates numerous electric motor only areas, which encompass 15% of the surface water area in the Refuge. More frequent pool drawdowns would occur, which also would impact traditional recreational boating access and travel corridors. According to the DEIS/DCCP,

"[c]hanges in areas open to certain uses and new regulations are likely to disrupt long-standing visitor expectations and practices . . . ." *Id.* at 277-78.

- Under Alternative C, the public use focus, areas currently open to recreational boating, camping and other beach-related recreation would remain unchanged. In addition, new boat access points would facilitate visits to some areas of the Refuge. Visitors would be required to pay a fee to obtain a Recreation Use Permit, which would finance increased law enforcement patrols. This alternative would also create 15 electric motor areas covering 10% of the total surface water of the Refuge. *Id.* at 278

- Under Alternative D, the wildlife and integrated public use focus, recreational boating, camping and other beach-related uses supposedly "would remain about the same even though managers may restrict use on certain beach areas under an 'open-unless-closed' policy." *Id.* at 278-79. In reality, this policy dramatically changes current boating conditions and permits Refuge manager to close areas of the Refuge without prior notice, whenever and for however long as they deem appropriate. The 16 electric motors created under this alternative would eliminate motorized boating access to 10% of the Refuge. *Id.*

In the draft compatibility determination contained in the DEIS/DCCP, Fish & Wildlife determined that motorized boating, including PWC use, is a compatible use in the UMR Refuge, subject to several limitations. DEIS/DCCP App. E (pp. 341-44). The NMMA and PWIA support this compatibility determination, but oppose the limitations and restrictions imposed on motorized boats through Alternative D. Motorized boats, including PWC's, are compatible with the unit's purposes and goals under the current regulatory regime, which Fish & Wildlife should adopt through this planning process.

C. Fish & Wildlife Policy Governing Recreational Uses, Including Motorized Boating

Pursuant to 16 U.S.C. § 668dd(a)(3), compatible wildlife-dependent recreational uses are permitted in National Refuges. A "compatible use" is defined as "a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge." 16 U.S.C. § 668ee(1). A "wildlife-dependent recreational use" is defined as "a use of a refuge involving hunting, fishing, wildlife observation and photography, or environmental education and interpretation." *Id.* § 668ee(2). Compatible wildlife-dependent uses are "priority uses" that should be facilitated. *Id.* § 668dd(a)(3)(C)-(D); (4)(H)-(I). The statute also prioritizes family-based recreation as well. *Id.* § 668dd(a)(4)(K).

PWC meet all of these requirements and should properly be considered a wildlife-dependent recreational use. The craft is ideal for hunting, fishing and wildlife observation. In addition, market surveys show that PWC are primarily purchased and used for family outings. Even where PWC are not used for wildlife-dependent recreational uses, they are nonetheless still compatible with the purpose and goals of the UMR Refuge, as the DEIS/DCCP properly determined. DEIS/DCCP App. E (pp. 341-44).

D. UMR Refuge Planning Process

Fish & Wildlife is required to produce the DCCP by statute. 16 U.S.C. § 668dd(e)(1)(B) ("The Secretary shall prepare a comprehensive conservation plan under this subsection for each refuge within 15 years after October 9, 1997."). Fish & Wildlife has not, however, published notice of the proposed conservation plan in the *Federal Register* as required by statute. *Id.* § 668dd(e)(1)(A) ("the Secretary shall . . . (ii) publish a notice of opportunity for public comment in the Federal Register on each proposed conservation plan"). Nor does it appear that Fish & Wildlife has any intention of publishing notice in the *Federal Register* as its letter accompanying the Executive Summary of the Draft Comprehensive Conservation Plan and Environmental Impact Statement makes no mention of such a step. ("The Draft Plan is an important step in the planning process . . . The process will end later this year when a final decision is made."). The APA requires notice-and-comment for legislative rulemaking. 5 U.S.C. § 553. The DEIS and DCCP are clearly laying the basis for legislative rulemaking, and Fish & Wildlife's failure to proceed via the *Federal Register* constitutes legal error.

Fish & Wildlife has overlapping authority over the UMR Refuge with the Army Corps of Engineers and the States, DEIS/DCCP § 1.4.3 (pp. 10-14), and must work cooperatively with both when adopting and administering long-term management regulations. The Army Corps of Engineers and Fish & Wildlife have been in conflict in the past. *Id.* (p. 11). To avoid further conflicts, the two entities have made several cooperative agreements to delineate their respective spheres of authority. As a result, Fish & Wildlife manages fish and wildlife and their habitats on the Corps' land, and the Corps manages navigation throughout the Refuge. *Id.* Thus, with respect to questions of navigation, Fish & Wildlife must cooperate with the Corps. Even so, the DEIS/DCCP does not discuss the Corps' view of the proposed navigation restrictions contained in the DEIS/DCCP.

Cooperation with the States is even more critical, as the States granted the UMR Refuge land in the first instance. Thus, "[t]he Refuge generally adopts or defers to state regulations and license requirements for the use and enjoyment of fish and wildlife resources." *Id.* § 1.4.3.2 (p. 13). To the extent that Alternative D disparately impacts PWC and other shallow draft vessels, it runs afoul of the UMR Refuge's long-standing practice of regulating in coordination with state law. For example, Illinois law precludes discrimination against PWC. *See Steier v. Batavia Park Dist.*, 670 N.E.2d 1215, 1220-21 (Ill. App. Ct. 1996). In *Steier*, the court found that, while a state statute gave the park district authority to "take charge of, control and police" any body of water on which it is located, the district was not authorized to interfere with the navigation of any navigable body of water or to shut off the access to any public dock or landing thereon. *Id.* (applying 70 Ill. Comp. Stat. Ann. 1205/11-4 and 70 Ill. Comp. Stat. Ann. 1205/11-5). In addition, "a park district . . . has all the rights and powers over its harbor as it does over its other property," with the restriction that "such park district shall not forbid the full and free use by the public of all navigable waters, as provided by Federal Law." 70 Ill. Comp. Stat. Ann. 1205/11.1-3(f). "[F]ull and free use" prohibits discrimination against personal watercraft. *Steier*, 670 N.E.2d at 1220-21. The proposed access restrictions contained in the DEIS/DCCP conflict with Illinois law to the extent that they discriminatorily restrict PWC use in the Refuge and improperly close navigable waters to motorized boats in general. Yet, the DEIS/DCCP contains no discussion of this conflict or how it may be resolved.

Fish & Wildlife acknowledges that the scope of the planning process precludes requisite analysis of all potential issues. DEIS/DCCP § 2.4.1 (p. 32) ("Since this EIS and CCP are programmatic in many issue areas, it may not contain the necessary detail on every future action outlined to adequately present and evaluate all physical, biological and socioeconomic impacts."). Additionally, the DEIS/DCCP specifically acknowledges that it has not addressed National Environmental Policy Act ("NEPA") issues that must be resolved before any alternative may be implemented. *Id.* Nevertheless, Fish & Wildlife seeks to use this incomplete planning process to curtail significantly motorized boating in the UMR Refuge for the next 15 years. To the extent that Fish & Wildlife has ignored the requirements of the APA and NEPA, its obligations to cooperate with other federal entities and states, and violated state laws, the DEIS/DCCP does not and cannot provide a proper basis for long-term planning.

E. Authorization Of Continued Motorized Boating In The UMR Refuge

The DEIS/DCCP asserts that "existing uses related to water recreation will not be eliminated and their continuation is common to all alternatives. These water-based uses include, but are not limited to, powerboating, waterskiing, jetskiing or other personal watercraft use, sailing, swimming, picnicking, and social gatherings." *Id.* § 2.4.1 (p. 34). While all existing uses may be preserved, the scope of those uses, particularly motorized boating, are dramatically curtailed under Alternative D, which effectively precludes backwater access and is tantamount to a ban on PWC and other shallow-draft vessels in such areas. This essential ban is inconsistent with the UMR Refuge's expressed goal of preserving compatible wildlife and non-wildlife dependent recreational opportunities and choices. *Id.* at xviii.

The NMMA and PWIA urge Fish & Wildlife to adopt Alternative A and to continue to allow operation of all types of motorized boats, including PWCs, as currently managed. Alternative A accommodates the broadest array of public uses and comports with the UMR Refuge's management goals. The historical record, coupled with the data and information included in these comments, fully support Alternative A and show that continued PWC and motorized boating use under that alternative will neither impair nor significantly impact Refuge resources.

III. MOTORIZED BOATING IN GENERAL, AND PWC USE IN PARTICULAR, WILL NOT IMPAIR THE UMR REFUGE'S VALUES OR RESOURCES.

Motorized boating is an accepted, compatible, priority use in the UMR Refuge and does not threaten Refuge resources. The NMMA and PWIA have provided data and information in these comments that support this conclusion. Moreover, the National Park Service ("NPS"), a coequal unit of the Department of the Interior, has reviewed this data in the context of numerous rulemakings. On each occasion, the NPS has determined that cumulative boating and PWC activity will not impair park resources. *See* Fire Island National Seashore Personal Watercraft Use, 70 Fed. Reg. 38,759, 38,767 (July 6, 2005) (codified at 36 C.F.R. § 7.20(d)); Bighorn Canyon National Recreation Area Personal Watercraft Use, 70 Fed. Reg. 31,345, 31,353 (June 1, 2005) (codified at 36 C.F.R. § 7.92(d)); Chickasaw National Recreation Area Personal Watercraft Use, 69 Fed. Reg. 53,630, 53,640 (Sept. 2, 2004) (codified at 36 C.F.R. § 7.50(b)); Lake Roosevelt National Recreation Area Personal Watercraft Use, 69 Fed. Reg. 35,519, 35,526

(June 25, 2004) (codified at 36 C.F.R. § 7.55(c)); Lake Meredith National Recreation Area Personal Watercraft Use, 69 Fed. Reg. 30,216, 30,223 (May 27, 2004) (codified at 36 C.F.R. § 7.57(h)); Amistad National Recreation Area Personal Watercraft Use, 69 Fed. Reg. 30,206, 30,216 (May 27, 2004) (codified at 36 C.F.R. § 7.79(d)); Glen Canyon National Recreation Area Personal Watercraft Use, 68 Fed. Reg. 55,448, 55,465 (Sept. 26, 2003) (codified at 36 C.F.R. § 7.70(g)); Assateague Island National Seashore Personal Watercraft Use, 68 Fed. Reg. 32,371, 32,375 (May 30, 2003) (codified at 36 C.F.R. § 7.65(c)); Lake Mead National Recreation Area Personal Watercraft Use, 68 Fed. Reg. 17,292, 17,306 (Apr. 9, 2003) (codified at 36 C.F.R. § 7.48(g)).

A. Air Quality: Motorized Boating Poses No Threat To Public Health Or Air Quality Even Under The Most Extreme Operating Assumptions.

The DEIS/DCCP does not identify any air quality concerns associated with motorized boating. Full-blown NEPA analyses of motorized boating emissions in comparable national park units have demonstrated that cumulative motorized boating emissions will not impair park air quality values or human health. *See* Lake Roosevelt National Recreation Area ("Lake Roosevelt NRA") Environmental Assessment ("EA") at 106-07.[3] These analyses have demonstrated time and again that PWC are among the cleanest-running craft on the water.

Both the USEPA and the California Air Resources Board ("CARB") regulate exhaust emissions from outboard and PWC engines. These emissions have declined rapidly in recent years due to very stringent regulations. Under the EPA requirements, outboard and PWC engines exhaust emissions are required to be reduced, using a phased approach that started in 1998 and runs through 2006. This approach has reduced exhaust emissions from theses engines by more than 75%. The CARB standards are three-tiered, and require that all outboard and PWC engines sold in California meet the EPA standards by 2001, an additional 30% reduction in 2004 and 50% reduction in 2008. This constitutes approximately a ninety percent (90%) emissions reduction.

To meet these standards, the engine companies have been rapidly converting from traditional carbureted two-stroke engine models to direct injection two-stroke and four-stroke engine models. Because of manufacturing and distribution efficiencies, most new boat engines including PWC units will meet the more stringent CARB standards. This conversion to cleaner running engines has significantly reduced emissions from outboard and PWC's throughout the country.

To assess PWC emissions, the PWC Companies retained Sierra Research, Inc. ("Sierra Research"), a leading air pollution control consulting firm located in Sacramento, California, to help identify and document the PWC emissions reductions achieved by the industry and the resulting impacts on several National Park System units contemplating PWC use. General information about Sierra Research is annexed as Exhibit 1.

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[3] The Lake Roosevelt NRA is similar to the UMR Refuge in that the park is actually a section of river that has been impounded.

To facilitate this analysis, each PWC Company supplied Sierra Research with comprehensive emissions data by PWC engine family for model years 1999 to 2003. These data are regularly submitted, on a certified basis, to the EPA and are publicly available from the agency. *See* <www.epa.gov/omswww/certdata.htm>. The PWC Companies also supplied Sierra Research with confidential production and sales data that are also regularly submitted to EPA, but are not publicly available.

Based on these data, Sierra Research produced reports containing the most complete and accurate information available about current and future PWC emissions. For example, in connection with the EAs issued by the Chickasaw NRA and Lake Mead NRA, Sierra Research estimated the average emissions of hydrocarbons ("HC") and oxides of nitrogen ("NOx") attributable to PWC use in those units. Sierra Research also constructed theoretical air quality models of possible worst-case exposure levels to carbon monoxide ("CO") that could potentially occur in these parks during periods of peak PWC activity. Copies of the Sierra Research Report for the Chickasaw NRA (the "Chickasaw Report") and Lake Mead NRA ("Lake Mead Report") are annexed as Exhibits 2 and 3.

The Chickasaw and Lake Mead Reports document that, in 2002, HC and NOx emissions from the existing PWC fleet were *already* more than 20% lower than they were before the EPA regulations took effect. Chickasaw Report at 1-2. Equally as important, these reports show that as PWC that meet the EPA and CARB standards replace older models, PWC emissions will be reduced an additional 70 to 80% by 2012. *Id.* The emissions projections contained in the Chickasaw and Lake Mead Reports demonstrate a more rapid decline in PWC emissions than is generally assumed. These projections are based on certified emissions and sales data supplied by the PWC Companies to the EPA, and account for the fact that, beginning with the 2006 model year, approximately 50% of all new PWC sales are expected to be CARB-certified due to the manufacturing and distribution efficiencies associated with producing the same models for sale in all 50 states. The projected emissions reductions are fully applicable in this instance.

Sierra Research's air quality analyses also demonstrate that PWC emissions do not impair human health. The Chickasaw Report, for example, included a CO emissions model based on worst-case operating assumptions and meteorological conditions. *Id.* at 3, 8. Using these extreme conditions, Sierra Research found that rider exposure at the Chickasaw NRA would still be about 67 to 88% *below* the applicable air quality standards, with shoreline exposure even less. *Id.* The Chickasaw Report's analysis shows that, even under unrealistically extreme operating assumptions and conditions, CO impacts will not even come close to the levels significant enough to impact human health.

A recent study by the National Institute for Occupation Safety and Health ("NIOSH") supports this conclusion. *See* NIOSH, *Carbon Monoxide Emissions and Exposures on Recreational Boats Under Various Operating Conditions* (2003). A copy of the NIOSH report is attached as Exhibit 4. NIOSH evaluated CO exposures levels from several recreational boats, including one PWC. The study shows that CO emissions from PWC compare favorably with other recreational boats and that PWC have not been linked to any documented cases of CO poisoning. The NIOSH study, together with the quantitative analyses set forth in the attached

Sierra Reports, provide important additional support for the conclusion that PWC use will neither impair nor significantly impact air quality or human health.

Some commentators have asserted that PWC might negatively impact air quality through the emission of polycyclic aromatic hydrocarbons ("PAH"). However even under worst case conditions, this will not be the case. In connection with the Lake Mead NRA's proposed PWC rule, Sierra Research analyzed PAH emissions from PWC. Sierra Research performed theoretical air quality modeling to determine whether, under *worst-case* conditions, airborne PAH emissions from PWC could conceivably create a human health risk. In its PAH analysis, Sierra Research used federal standards for permissible exposure to PAH established by the Occupational Safety and Health Administration ("OSHA") and the NIOSH.

To ensure a conservative analysis, Sierra Research based its theoretical PAH modeling on the assumption that peak PWC activity on Lake Mead would be *triple* the daily average activity reported in the Draft Lake Management Plan/Environmental Impact Statement and that such activity would be concentrated within a narrow band 100 feet from shore. This worst-case modeling provided an estimate of the maximum PAH concentration to which PWC riders and visitors along the shore could conceivably be exposed, assuming all PWC riders followed exactly the same narrow path back and forth along the shoreline. As documented in the Lake Mead Report, the PAH concentrations derived from this modeling were orders of magnitude *below* the permissible exposure limits established by OSHA and NIOSH. A proper PAH analysis, using the analytical approach set forth in the Lake Mead Report, refutes unsubstantiated claims by PWC opponents that PAH emissions from PWC operating in the UMR Refugee could endanger human health.

B. Water Quality: Motorized Boating-Related Water Contaminants Will Not Adversely Impact Human Health Or Aquatic Resources.

The DEIS/DCCP identifies water quality concerns related to "sedimentation which is filling backwaters and nutrient loads from land use in the Refuge watershed." DEIS/DCCP at xix. None of these alleged impacts are linked to motorized boating or to PWC use in the UMR Refuge or its backwater areas, and there is no basis for positing such a link.

Boat engine and PWC emissions have declined significantly due to industry's rapid conversion to cleaner engine technologies. Indeed, as demonstrated in the Chickasaw and Lake Mead Reports, emissions have been reduced by over 20%. Because of their reduced emissions, PWC are the ideal craft for operating in shallow and backwater estuarine environments, like those within the UMR Refuge.

The transition to four-stroke and direct injected two-stroke engines to meet the requirements of the EPA 2006 and CARB 2004 and 2008 emissions standards is occurring more rapidly than the EPA and others assume. Sales of these newer models have overtaken

conventional carbureted two-stroke outboard and PWC engines[4] The amounts of unburned fuel released into the Refuge's waters will, accordingly, decline even more quickly over time.

In addition, PWC use will not impair or significantly impact the Refuge's aquatic resources. Studies show, for example, that most unburned gasoline and gasoline additives emitted from two-stroke marine engines evaporate from water within the first hour and 15 minutes after they are released. *See* Jean M. Revelt, *The Effects of Marine Engine Exhaust Emissions on Water Quality, Summary of Findings of Various Research Studies* (EPA 1994). At 86 degrees Fahrenheit (which approximates a mid-day temperature during the summer peak use period), 84% of the unburned gasoline/additive mix released into the water evaporated within 75 minutes. *Id.* at 4. Even at the much lower temperature of 59 degrees Fahrenheit, the figure was 70%. *Id.*

While in 1995 a peak number of 200,000 new PWC units were sold, it is undisputed that new PWC sales declined each year from 1995 through 2002. *See* <http://www.pwia.org/faqs/sales.html>. At the same time, the PWC Companies have rapidly converted to cleaner running engine models, resulting in a substantially lower emission PWC fleet. These sales and emissions-reduction trends confirm that the PWC fleet on the water today is cleaner running than ever before. Regarding outboard engines, at this time, nearly if not all engines in this category have been converted to new technology.

The DEIS/DCCP states that the proposed no-wake zones are a way of controlling sedimentation and water turbidity in the UMR Refuge, but these concerns do not apply to PWC. PWC do not affect sedimentation or water turbidity because PWC lack exposed propellers and do not churn the river bottom. For all other motorized boat access, NMMA supports no wake zones only if established on a foundation of sound science and that do not pose a boating safety or navigation hazard.

C. Soundscapes: Because Existing Boats, Including PWCs, Meet Applicable Noise Standards And Newer Models Are Even Quieter-Running, Boats Will Not Significantly Affect Soundscapes In The UMR Refuge.

The DEIS/DCCP identifies noise disturbances as the major justification for restricting motorized boating in backwater areas. In particular, the DEIS/DCCP singles out boat noise and its impact on visitor experiences and wildlife in backwater areas. *See* DEIS/DCCP at xxi ("Technology in the form of jet skis, air boats, bass boats, and shallow water motors have introduced more users, more noise, and more disturbance into backwater areas of the Refuge. Citizens have expressed concern over the declining opportunities to experience the quiet and solitude of these unique Refuge areas, while managers are concerned about the effects of the disturbance on sensitive wildlife species."). *See also id.* § 2.4.5 (p. 128).

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[4] Market research shows that customer awareness of the four-stroke technology is high and that cleaner running engine models account for more than 50% of total new sales. *See Ehlert's Powersports Business Market Data Book 2002* at 26 (annexed as Exhibit 5).

The soundscape conclusions reached by the DEIS/DCCP inappropriately focus on motorized boat noise and overstate both boat sound emissions and their potential impact on the UMR Refuge. The prevailing federal regulation prohibits the operation of motorized vessels that exceed 82 decibels when measured at a distance of 82 feet (25 meters) from the vessel. 36 C.F.R. § 3.7. The United States Coast Guard uses the test procedures established in SAE J34 to measure boat noise under this standard.[5] All boat engines and PWC are capable of meeting the federal standard.

The National Park Service recently tested the noise levels of motorized boats, including PWCs, in the Glen Canyon NRA. The testing indicated that the maximum noise levels for PWC compared favorably to the maximum noise levels for other motorized vessels. In particular, the levels for PWC at 25 meters (82 feet) were approximately 68 to 76 A-weighted decibels; whereas the levels for other motorized vessels at 25 meters (82 feet) were approximately 64 to 86 A-weighted decibels. *See* Glen Canyon NRA Draft Environmental Impact Statement at 103-04. Independent, unbiased sound testing conducted for the Tahoe Regional Planning Authority and the New Jersey State Police have reached similar results. Brown-Buntin Associates, *Environmental Noise Analysis, Lakeland Village Watercraft, Lake Tahoe, CA* (Sept. 14, 1992) (annexed as Exhibit 7); Noise Unlimited Inc., *Boat Noise Tests Using Static and Full-Throttle Measurement Methods*, Sept. 1995 - Oct. 1995 (annexed as Exhibit 8). *See also* International Council of Marine Industry Associations, Marine Engine Committee, *Personal Watercraft Sound Test Report, Jet Ski Village, France* (Sept. 2003) (testing conducted for international trade association to certify compliance with European sound standards confirmed that existing PWC noise levels were compliant and showed continued improvement on average of a 2.5 A-dB reduction in noise from 2001 to 2003) (annexed as Exhibit 9).[6]

Boating opponents often adopt questionable assumptions about boat, and PWC noise in particular. While it may be true that PWC leave the water on occasion, opponents exaggerate the craft's propensity to become airborne. The majority of PWC do not leave the water at all, let alone with the frequency assumed. This is in large part due to their design: newer models are longer, wider, heavier, and have additional seating capacity. Because of these features, newer models leave the water much less frequently than older craft. Three-passenger PWC -- which account for the majority of new sales -- can weigh as much as three times more than first generation single-passenger, stand-up models and are much less apt to leave the water.

Moreover, the PWC Companies have made significant progress in reducing PWC noise through technological innovations. Since 1998, the PWC Companies have reduced engine sound levels by up to seventy percent (70%). These reductions in sound levels also involve lowering the sound made as the "pitch" of the engine. Pitch is the measurement of the frequency that the

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[5] SAE J34 measures sound levels from a non-shoreline location of a boat operating full throttle at a distance of 82 feet (25 meters). A copy of SAE J34 is annexed as Exhibit 6.

[6] PWC opponents have suggested that PWC emit noises as loud as 102 decibels, without specifying the distances or method of sound measurement. The NPS' own testing, as well as the objective tests cited in the text, refute such unsubstantiated claims.

wavelength of sound vibrates, and is the aspect of PWC-associated sound that some claim to be "annoying." To reduce the noise emitted from the air intake, newer model PWC generally utilize air intake resonators with multiple maze-like chambers (or "tunnels"). These chambers eliminate a direct path for the sound waves to escape. As sound waves pass into these chambers, they bounce back and cancel out incoming, identical but opposite "crest" waves. Baffles are used for counter frequency and to quiet vibration. The PWC Companies also employ noise-absorbing foam between the liner and the hull, so the vessels are both quieter and more durable. The thickness of the crankcase wall has been increased to further muffle noise and vibration. In addition, rubber is used as padding around the jet pump dampers to absorb the shock loads and quell driveline noise. Illustrative articles describing more specifically the noise suppression systems used by some of the PWC Companies are annexed as Exhibits 10 and 11.

The erroneous notion that PWC "continually" leave the water appears to be based on a misperception of PWC users. PWC users are not reckless "thrillcraft" operators, as detractors wrongly allege. Rather, PWC are used predominantly for family-oriented outings and activities, such as cruising, sightseeing, and pulling water-skiers, tubes, and wakeboards.

Additionally, NMMA and PWIA recognize that improper maintenance and discourteous operation of any motorized vessel, such as operating too close to a shoreline, can lead to sound disturbances. NMMA, PWIA and our member companies have actively promoted model state legislation that addresses these issues. Entitled the "National Marine Manufacturers Association Model Noise Act," this legislation establishes muffler requirements and maximum noise levels for motorized boats, and prescribes accepted SAE standards for testing and enforcement. A copy is annexed as Exhibit 12. Specifically, the Model Noise Act would prohibit the operation of any motorboat, including PWC, in such a manner as to exceed a noise level of 75 decibels measured as specified in SAE J1970 from any point on the shoreline.[7] The Model Noise Act would further prohibit the manufacture or sale of any motorboat that cannot be operated in compliance with the prescribed sound levels.

In addition, the PWIA and PWC Companies have also sponsored national education programs and user awareness campaigns to promote safe and courteous use of PWC. These efforts have emphasized that the operator of a PWC or any other motorized boat is responsible for controlling the vessel's noise. For example, the PWIA has developed "*Sound Advice: 4 Ways to Make the Waters Quieter.*" This four-point program is easy to remember and is designed to minimize complaints about PWC noise. The four tips include: (1) keep the quiet stock exhaust on your boat; (2) approach and leave shore slowly; (3) concentrate your high-speed sprints away from the shore; and (4) avoid early morning and early evening riding near residential areas. A summary of the "Sound Advice" program is annexed as Exhibit 14. Furthermore, the PWIA and PWC Companies are committed to working with state regulators to improve boater education. For example, in 2002, the Florida Fish and Wildlife Commission in cooperation with the PWIA updated the "Jet Safe" video, which includes information on safe

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[7] SAE J1970 establishes the procedure for measuring the sound level of pleasure motorboats at a position on the shore under conditions other than stationary mode operation. A copy of SAE J1970 is annexed as Exhibit 13.

operation, state law requirements, sound issues and environmental awareness. This educational video was mailed to over 100,000 PWC owners.

There is also no evidence that motorboat noise and in particular PWC noise adversely affects aquatic fauna or animals. PWC typically exhaust above the water or at the air/water transition area. Consequently, most PWC sound is transmitted through the air and not the water. *See Hearing Into That Puzzling World Below*, In-Fisherman, at 36-38 (1995) (annexed as Exhibit 15) (finding that PWC emit minimal underwater noise). Since 1995, Dr. James Rodgers of the Florida Fish and Wildlife Conservation Commission has been conducting scientific studies of the effects of human disturbances on wildlife. Because of the breadth of his research, Dr. Rodgers' findings are particularly relevant to the Refuge's planning process and to its concerns about the interaction between motorized boats and the unit's wildlife in backwater areas. Indeed, this objective research confirms that the Refuge's conjecture about wildlife disturbances cannot provide a basis for long-term management prescriptions. Through his research, Dr. Rodgers has found that any human interaction with wildlife will likely cause some disturbance. However, his studies have shown that PWC are no more likely to disturb wildlife than any other form of human interaction. Dr. Rodgers' research clearly shows that there is no reason to differentiate PWC from motorized boating based on claims on wildlife disturbance. *See Roberts v. Mainella*, V-02-22, Affidavit of James A. Rodgers, Jr. (S.D. Tex. Apr. 4, 2002) (annexed as Exhibit 16); James A. Rodgers, Jr. & Henry T. Smith, *Buffer Zone Distances to Protect Foraging and Loafing Waterbirds from Human Disturbance in Florida*, 25 Wildlife Society Bulletin 139 (1997) (annexed as Exhibit 17); James A. Rodgers, Jr. & Stephen T. Schwikert, *Buffer-Zone Distances to Protect Foraging and Loafing Waterbirds from Disturbances by Personal Watercraft and Outboard-Powered Boats*, 16 Conservation Biology 216 (Feb. 2002) (annexed as Exhibit 18); James A. Rodgers, Jr. & Stephen T. Schwikert, *Buffer Zone Distances to Protect Foraging and Loafing Waterbirds from Disturbances by Personal Watercraft in Florida*, Bureau of Wildlife Diversity Conservation Annual Report (2000) (annexed as Exhibit 19).

Finally, the DEIS/DCCP lacks objective evidence of sound disturbances that would justify the sweeping access restrictions, which render nearly 6% of the unit off limits to motorized boats. Instead, the DEIS/DCCP relies entirely on anecdotal accounts of user disturbances by motorized boats in backwater areas. Such evidence does not, and cannot, provide a basis for the long-term management regulations set forth in Alternative D.

D. Other Resources: Existing Access Restrictions And Boating Rules Adequately Protect Refuge Wildlife, Vegetation And Cultural Resources.

The DEIS/DCCP contains no evidence that motorized boating impairs other resources, and there certainly exists no basis for finding that PWC have any more impact that other vessels.

There are *no* documented cases of deliberate harassment or collisions with wildlife by motorized boats, including PWCs, in the Refuge, and there exists *no* evidence that motorized boat use disturbs wildlife in backwater areas. Even so, Fish & Wildlife conjectures that PWC may affect wildlife and habitats in the Refuge. This speculation is unfounded, as it not only lacks an evidentiary basis, but also ignores the attributes of the craft that minimize the potential for disruption of wildlife and habitats. PWC are quieter and cleaner running as a result of the industry's commitment to innovation and improving technology. The craft lack exposed

propellers, which could strike submerged or diving animals or churn underwater ecosystems. The NPS has acknowledged these fact in several PWC rulemakings. In the final Chickasaw NRA rule, for example, the NPS properly concluded that "it appears that personal watercraft are no more apt to disturb wildlife than are small outboard motorboats." 69 Fed. Reg. at 53,636.

Because PWC lack an exposed propeller, they are much more environmentally friendly in shallow-water environments. Moreover, to prevent potential damage to the jet pump machinery that powers the vessels, the PWC Companies expressly warn against operation in water less than two feet deep. A comprehensive test evaluating the impact of PWC on bottom environments indicates that PWC use, as recommended by the manufacturers, does *not* impact seagrass beds, water turbidity or cause scarring of the grassbeds. *See* Continental Shelf Associates, Inc., *Effects of Personal Watercraft Operation on Shallow-Water Seagrass Communities in the Florida Keys* (1997) (annexed as Exhibit 20).

In addition, motorized boat users will not impact cultural or archeological resources in the UMR Refuge. There is no evidence in the DEIS/DCCP of any boater or PWC user impact to these resources. Moreover, because canoes, kayaks, hikers, fishermen, hunters and other users will also come into contact with these resources, it is difficult to quantify the impact of motorized boats. There is no basis to conclude that motorized boat users are more likely to harm the park's cultural resources.

E. Motorized Boat Use In The UMR Refuge Will Not Create Unique Or Disproportionate Safety Problems.

The DEIS/DCCP proposes new no-wake areas to promote boater safety. The NMMA, PWIA and our member companies support fair, evidenced-based and generally applicable boating rules that are tailored to promote the safety of all park visitors. Yet, the DEIS/DCCP contains no evidence supporting the necessity of the proposed no-wake areas, and safety is not identified as a basis for the sweeping backwater boating restrictions proposed in Alternative D.

Furthermore, contrary to the suggestions of PWC-detractors, there is no basis for concluding the PWC would create unique or disproportionate safety hazards in the main river channel or backwater areas. Boat design and boating safety, as a general matter, are within the exclusive jurisdiction of the United States Coast Guard. *See* H.R. Rep. No. 94-1569, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4290, 4299. The Coast Guard has reviewed and approved all past and current PWC designs, expressly finding that the manufacture and sale of such vessels "would not adversely affect boating safety." *See* 46 U.S.C. § 4305.[8]

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[8] In August 2002, the SAE PWC Subcommittee, with support from the Coast Guard, completed balloting of SAE Recommended Practice J2608, which establishes a test methodology and criteria for off-throttle steering performance of PWC beginning with the 2006 model year. Some PWC models already meet these criteria. A copy of J2608, as balloted, is annexed as Exhibit 21.

PWC detractors have in the past attempted to misuse statistics to suggest that PWC are more dangerous than other vessels. These parties have frequently invoked a 1996 National Transportation Safety Board report found that PWC represented 7.5% of state-registered recreational boats but accounted for 36% of recreational boating accidents. These national accident figures are dated, potentially misleading and must be considered in proper context. Only a small percentage of boating accidents are reported and the frequency of reporting varies widely among boat types. For these reasons, the Coast Guard cautions in its Boating Accident Report Database ("BARD") that:

> Non-fatal accidents cannot be assumed to have occurred in numbers proportional to the reported statistics because the act of reporting an accident is not a random sampling of accidents in the statistical sense. Rather, selection is based on the ability and willingness of those involved to file a report. The reporting rates of subgroups of accidents, such as those involving personal watercraft . . . probably differ greatly depending upon unspecified variables.

2003 United States Coast Guard Boating Statistics at 2.

Several factors suggest that PWC accidents are in fact reported more often than other boating accidents. For example, PWC are rented more frequently and rental operators report most accidents for insurance and product liability reasons. Many PWC accidents also involve collisions that must be reported under state law. In contrast, people often do not report accidents when they have fallen in an open motorboat, injured themselves while starting up an outboard motor, or suffered injuries while canoeing or kayaking.

PWC users comprise a small percentage of the total number of motorized boating users across the country, therefore the number of PWC in the Refuge will be relatively small and will not create unique or disproportionate safety risks. There is substantial empirical support for this conclusion. A study of boating incidents at the Glen Canyon NRA, from 1999 to 2001, found that:

> (1) PWC accounted for 26% of all "boat days" at Glen Canyon. A "boat day" equals one watercraft on the water for a 24-hour period.
>
> (2) PWC accounted for 115 of the 811 accidents, or approximately 14% of all accidents. This is a little more than half of the expected accidents based on 26% of all "boat days".
>
> (3) PWC accounted for 89 of the 444 accidents involving personal injury, or approximately 20% of the accidents involving personal injury. This is less than expected based on 26% of all "boat days".

See Glen Canyon NRA Draft Environmental Impact Statement at 138-39.

The PWC Companies asked Heiden Associates to examine boating accident data at the Fire Island National Seashore ("Fire Island NS") in response to the environmental assessment for that park. The analysis performed by Heiden Associates ("Heiden Report") is annexed as

Exhibit 22. As shown in the Heiden Report, the BARD data include 127 boating accidents in the Fire Island NS (Great South Bay, Moriches Bay, and Narrows Bay) between 1995 and 2000. PWC were involved in 22 of these accidents, representing 17% of all boating accidents in the area. The EA contains a July 1999 study that observed 60 PWC per hour and 300 total boat observations per hour. According to this study, PWC account for approximately 20% of the boating activity in the Fire Island NS. Fire Island NS EA at 13, 63. This suggests that the percentage of boating accidents in the park involving PWC (17%) is actually less than might be expected based on the level of usage (20%). Moreover, based on these exposure estimates, the 1999 rate of accidents per boat observation in the Fire Island NS is essentially the same for PWC and other boats (*i.e.*, 0.10).

Third, the Coast Guard has found that operator inattention, reckless operation, and inexperience are primary causes of boating accidents for motorized vessels, including PWCs. 2003 United States Coast Guard Boating Statistics at 7, 20, 37, *available at* <www.uscgboating.org/statistics/Boating_Statistics_2003.pdf>. The NMMA, PWIA and our member companies strongly support all reasonable efforts to mitigate these causes, such as mandatory boater education, minimum age requirements, and strict enforcement of navigation and safety regulations in every state. For example, model legislation developed by the PWIA encourages all states to establish a minimum age of sixteen (16) years to operate a PWC and a minimum age of eighteen (18) to rent a PWC. The model legislation also establishes mandatory boater education, requires rental operators to administer prescribed boating safety instruction, and imposes other reasonable regulations on PWC use. A copy of the PWIA's model legislation is annexed as Exhibit 23. As reported by the Coast Guard, the PWC Companies have also voluntarily agreed to restrict the maximum speed of future models to 65 miles per hour.

Finally, there is certainly no basis for adopting vessel-specific no-wake areas, which the U.S. Coast Guard and National Association of State Boating Law Administrators ("NASBLA") have unequivocally deemed dangerous. The U.S. Coast Guard has clearly indicated that requiring PWC to operate at slower speeds than larger and more powerful motorized vessels is dangerous. In response to a recent congressional inquiry, the Coast Guard recommended against a proposal that would have restricted PWC to no-wake speed in waters less than two feet deep. The Coast Guard's response to the following question clearly demonstrates that a PWC-only no-wake requirement would be detrimental to both PWC users and other boaters:

> ***Could the speed differential between PWC traveling at no-wake speed in the same area with other unlimited-speed motorized boats present a safety hazard?***
>
> Restricting only PWC to no-wake speed in shallow water could present a safety hazard if other vessels operated in the same area were operated at significantly faster speeds. Although most larger boats would be restricted due to the water depth, some, such as jet boats or airboats, could operate at significantly higher speeds.

Letter from J.C. Card, Acting Commandant, U.S. Coast Guard to Hon. Dave Weldon of May 28, 1999, at 1 (annexed as Exhibit 24).

NASBLA has also adopted a policy position on speed and proximity that requires uniform application of no-wake zones to *all* motorized vessels. A copy of NASBLA's policy position is annexed as Exhibit 25. NASBLA recognizes that "operation of a vessel at a speed in excess of headway speed while in close proximity to another vessel, marked swim area, or swimmer is dangerous and irresponsible behavior." NASBLA thus recommends "that any legislation enacted by states in regard to speed and proximity requirements should be applicable to all vessels." *Id.*

The NPS has also recognized that uniform no-wake zones better promote boating and visitor safety than PWC-only zones. The Final Rule governing PWC use in the Lake Mead NRA reflects that the NPS will institute subsequent rulemaking proceedings to extend no-wake areas to all watercraft operating on the lake. Lake Mead Final Rule at 4. This uniform approach to regulating PWC is both fair and consistent with the positions adopted by the Coast Guard and NASBLA. Thus, to the extent the Refuge intends to impose additional wake restrictions, there is no basis for rejecting the expert positions of the Coast Guard and NASBLA.

IV. THE PREFERRED ALTERNATIVE SHOULD BE REJECTED BECAUSE IT BANS APPROPRIATE AND PRIORITY USES WITHOUT JUSTIFICATION.

Alternative D bans "compatible wildlife-dependent recreational use" in backwater areas even though such uses are entitled by statute to priority status. Motorized boating, including PWC use, meets the definition of compatible wildlife-dependent recreational uses, boats can be used for hunting, fishing and wildlife observation and photography. Indeed, they are ideal for these activities because they are cleaner-running, quieter and more maneuverable than ever before. Even when PWC are used for non-wildlife dependent activities, they are still compatible in the Refuge and are well-suited to family-based excursions, *see* Yamaha Motor Corporation, *1998 PWC Owners Survey* (Nov. 1998) (non-confidential excerpts attached as Exhibit 26), which are also entitled by law to favored status. Small shallow motorized boats, including PWCs are most commonly used for touring and sight-seeing, which is perfectly consistent with the UMR Refuge's purpose. For these reasons, the proposed ban, which disparately impacts shallow-water craft, simply does not promote the UMR Refuge's professed management goals.

Furthermore, the record does not support Alternative D. The DEIS/DCCP lacks any evidence to support the motorized boating ban. Fish & Wildlife relies entirely on anecdotal accounts that some refuge users would prefer limitations on backwater motorized use. The objective facts provided in these comments refute any potential characterization of motorized boats, and PWC in particular, as harmful to Refuge resources.

Moreover, the absence of a requisite NEPA analysis precludes Fish & Wildlife from restricting boating access on the current record. NEPA unequivocally requires that an environmental impact statement ("EIS") be prepared for any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The EIS must contain a "detailed statement" on: (1) the environmental consequences of the proposed action; (2) unavoidable adverse consequences of the proposed action; (3) alternatives to the proposal; (4) an analysis of the local short-term uses of the area and the enhancement of long-term productivity; and (5) irreversible consequences of the proposal. *Id.* at § 4332(2)(C)(i)-(v). "The primary purpose of the environmental impact statement is to serve as an action-forcing device to insure

that the policies and the goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government." 40 C.F.R. § 1502.1. Thus, the EIS must "provide full and fair discussion of significant environmental impacts," and must be "supported by evidence that the agency has made the necessary environmental analyses." *Id.* The Council on Environmental Quality's implementing regulations make clear that these requirements are not discretionary: "An environmental impact statement is more than a disclosure document. It *shall* be used by Federal officials in conjunction with other relevant material to plan actions and make decisions." *Id.* (emphasis added).

The DEIS/DCCP contains none of the systematic, evidence-based analyses that are required by law and, therefore, it provides no basis for implementing the severe boating restrictions set forth in Alternative D. Indeed, Fish & Wildlife has itself admitted that, "[s]ince this EIS and CCP are programmatic in many issue areas, it may not contain the necessary detail on every future action outlined to adequately present and evaluate all physical, biological and socioeconomic impacts." DEIS/DCCP § 2.4.1 (p. 32). This admission, standing alone, precludes Fish & Wildlife from restricting boating access on the current record.

Even more glaring, however, is Fish & Wildlife's complete failure to follow appropriate notice-and-comment procedures as it is required to do by the APA. Fish & Wildlife cannot now seek to promulgate a final rule regulating the UMR Refuge for the next 15 years as it has failed to adhere to the most basic rules of administrative procedure.

V. ALTERNATIVE A SHOULD BE DESIGNATED THE PREFERRED ALTERNATIVE BECAUSE IT BEST ACCOMPLISHES THE REFUGE'S GOALS, ACCOMMODATES THE BROADEST MIX OF USES, AND ENSURES FAIR AND ENVIRONMENTALLY SOUND BOATING MANAGEMENT.

Alternative A is a balanced and defensible approach to regulating boating within the UMR Refuge. This time-tested alternative continues all generally applicable boating and access restrictions, no-wake zones, and state law and rules. As the history of motorized boating in the Refuge shows, these limitations are well-tailored to safeguard natural and cultural resources and to ensure that users will operate their craft in a safe and appropriate manner. NMMA and PWIA support Alternative A, which should be designated as the preferred alternative.

The no-action alternative best facilitates appropriate and compatible uses and promotes the UMR Refuge's professed regulatory goals. The record, supplemented by these comments, supports continued adherence to the no-action alternative. Motorized boats, and PWC in particular, will not affect Refuge resources in any significant manner. Technological innovations have reduced water and air emissions, and have significantly improved motorized boats sound characteristics. In addition, when operated as recommended by the manufacturer, PWC are no more likely to affect wildlife and wildlife habitats than any other type of boat, including non-motorized boats such as canoes and kayaks. The DEIS/DCCP contains no evidence that justifies the proposed sweeping restrictions, which would close over 6% of the UMR Refuge to PWC use. Alternative A will best accomplish the unit's management objectives because it will promote diverse recreational opportunities while simultaneously ensuring that recreation activities in the Refuge are managed in a uniform and environmentally responsible manner.

Until the UMR Refuge completes a full rulemaking, and complies with APA and NEPA requirements, the unit must remain open to motorized boats in accordance with Alternative A, the current regulatory regime.

VI. CONCLUSION

Without following appropriate administrative procedure or conducting the substantive analyses required to impose the sweeping restrictions set forth in Alternative D, the DEIS/DCCP seeks to significantly curtail priority boating and PWC activities in the UMR Refuge for the next 15 years. It is undisputed that motorized boating is compatible with the UMR Refuge's purpose and goals. The record, as supplemented by these comments, unequivocally support this conclusion and refutes the stale claims, "junk" science, and other mischaracterizations levied by PWC detractors. The U.S. Fish & Wildlife Service should resist pressure from these special interest anti-motorized recreation groups, who speak for a small minority and seek to impose their own restrictive preferences on the use of park resources.

NMMA and PWIA urge the U.S. Fish & Wildlife Service to reject Alternative D, and instead to adopt Alternative A, because it is most compatible with UMR Refuge management goals and provides enjoyment for the most number of visitors.

Respectfully submitted,

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